

STATE OF MICHIGAN
COURT OF APPEALS

DARREN FINDLING, Personal Representative of
the Estate of FRANK E. EARLY,

Plaintiff-Appellant,

v

JEFFREY PARKER, M.D., and JEFFREY
PARKER, M.D., P.C., d/b/a ADVANCED
SPORTS MEDICINE, P.C.,

Defendants-Appellees.

UNPUBLISHED
September 28, 2006

No. 267519
Oakland Circuit Court
LC No. 05-064647-NH

Before: Davis, P.J. and Sawyer and Schuette, JJ.

SCHUETTE, J. (*concurring in part and dissenting in part*).

I agree with the majority's decisions on the statute of limitations and affidavit of merit issues. I would reverse the trial court's finding that the statute of limitations had expired. I also would affirm the trial court's grant of summary disposition to the defendants. The failure to file an affidavit of merit simultaneously with the complaint renders the filing ineffective. *Scarsella v Pollak*, 461 Mich 547, 553; 607 NW2d 711 (2000). However, where the statute of limitations has not yet run, "a plaintiff who files a medical-malpractice complaint without the required affidavit is subject to a dismissal *without prejudice*, and can refile properly at a later date." *Scarsella, supra* at 551-52. (Emphasis added.). Such a sanction is also consistent with our recent decision in *Verbrugghe v Select Specialty Hosp-Macomb Co*, 270 Mich App 383; 715 NW2d 72 (2006), where the claim was dismissed without prejudice for failure to provide a notice of intent within the required 182 days.

I do, however, dissent from the majority opinion's inclusion of a reference concerning the issue of equitable tolling. The majority chose not to reach the merits of this specific issue. I would affirm the holding of the trial court that equitable tolling did not apply in this case. *Eggleston v Bio-Medical Applications of Detroit*, 468 Mich 29, 33; 658 NW2d 139 (2003).

/s/ Bill Schuette